

REMARKS

PORTIONS OF THE OFFICE ACTION THAT ARE UNINTELLIGIBLE:

This amendment and response is filed without the benefit of clarification of certain unintelligible portions of the office action identified as follows:

- 1) page 3, line 5 - it is unclear what is meant by "ca Also Oe";
- 2) page 3, line 7 - it is unclear what is meant by "Oe";
- 3) page 3, lines 7 - 9 - (a) it is unclear whether reference to columns 11 and 12 is relevant since these portions of the reference are in the claims; (b) there is no Fig. 16 in the reference; and (c) there are no "d1", "1a" or "1b" elements in the reference;
- 4) page 4, line 12 - it is unclear what is meant by "ca Also Oe"; and
- 5) page 4, line 14 - it is unclear what is meant by "Oe".

The undersigned attorney tried unsuccessfully on three separate occasions to seek clarification from the Examiner [by telephone voice mail messages on February 3 and 6, 2006, and with direct conference with the Examiner on February 7, 2006]. On February 7, 2006, the undersigned attorney was told by the Examiner that no communication could be made regarding the application until "a new power of attorney" was filed in this case. The undersigned attorney explained that the new power of attorney has been filed

on February 2, 2006 [Appendix A attached hereto]. The undersigned attorney explained to the Examiner that Applicant wished to timely file this response and amendment without the necessity of paying for any extension of time, however, further discussion to clarify the unintelligible portions of the office action as set forth above was denied by the Examiner. Since that time, Applicant again filed his new power of attorney and change of correspondence address on February 13, 2006 [Appendix B attached hereto]. As of the date of this response, the Private PAIR system does not reflect the change of authorized representative or correspondence address. The undersigned attorney's schedule includes out-of-state oral deposition discovery matters and related preparation in Case no. 2:05-CV-00844-FCD-GGH pending in the U.S. District Court for the Eastern District of California, Sacramento Division. These trial obligations necessitate the filing of this amendment and response at this time, without verification that the previously detailed and filed powers of attorney [Appendices A and B attached hereto] has in fact been lodged in this case. Applicant reserves the right to amend or supplement this response without prejudice should clarification of the unintelligible matters identified herein necessitate additional argument or amendment.

CLAIM OBJECTIONS:

In the Office Action, the Examiner objected to claims 1, 5, and

9 because of the informality of these claims not being clear as to which base houses the second magnetic member. Claims 1, 5, and 9 have been amended to overcome the Examiner's objections and correct these claims consistent with the specification.

CLAIM REJECTIONS:

In the Office Action, the Examiner rejected claims 1 - 9 under 35 U.S.C. § 103(a).

Claims 1 - 4:

Claims 1 - 4 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Gaudioso (US 6,799,965) in view of Jensen (US 6,709,266) and in view of Nevin, et al. (US 4,240,783).

In response to the Examiner's rejection of claims 1 - 4 under 35 U.S.C. 103(a) as being unpatentable over Gaudioso (US 6,799,965) in view of Jensen (US 6,709,266) and in view of Nevin, et al. (US 4,240,783), Applicant respectfully points out that the prior art patents cited by the Examiner, when applied to the claim language of the present amended application in each of the claims rejected under 35 U.S.C. 103(a), do not suggest, or show motivation for, the combination or modification of the present invention. More specifically:

1. The Gaudioso (US 6,799,965) patent reference teaches away from the present invention in that it is directed towards assemblies for extinguishing a lighted candle flame [see U.S. Patent No. 6,799,965; column 1, lines 5 - 10, 35 - 38, column

2, lines 4 - 21, Claims 1 through 26], whereas the present invention teaches the direct opposite, i.e., maintaining a pleasing lighted candle. *Lewmar Marine, Inc. v. Barient, Inc.*, 3 U.S.P.Q. 2d 1766, 1768 (Fed. Cir. 1987). In the present invention the "first magnetic member 11 and thus floating candle 10 are caused to rotate by magnetic attraction to produce a pleasing rotating flame." [specification, page 4, lines 3 - 4; Fig. 1]. The present invention also teaches an inexpensive device which can be easily adapted to a variety of candle sizes [specification, page 3, lines 6 - 7; Fig. 2], without regard to orientation of magnetic polarity. Thus, the Gaudioso reference teaches away from the present invention in that it is directed to apparatus which function by adhering to specific polarity alignment [see U.S. Patent No. 6,799,965; column 4, lines 35 - 44], which properly functions when reverse polarity of magnetic members repel each other to extinguish or otherwise douse a lighted candle [see U.S. Patent No. 6,799,965; column 4, line 63 through column 5, line 9], and wherein the physical distance between magnetic members varies as the apparatus functions [see U.S. Patent No. 6,799,965; column 7, lines 5 - 9]. Further, Gaudioso teaches limited rotatable motion in perpendicular planar orientation between magnetic members [see U.S. Patent No. 6,799,965; column 5, lines 10 - 21; column 6, lines 54 - 59; Figs. 4 and 10]. The

present invention teaches full rotatable motion in parallel planar orientation between magnetic members [see, e.g., specification, page 3, line 22 through page 4, line 4; Fig. 2].

2. The claims are believed allowable as amended because the references may not be combined in the manner attempted for the reason that it is not permissible to use the claims as a framework from which to pick and choose among individual references to recreate the claimed invention. *In re Fine*, 5 U.S.P.Q. 2d 1596, 1599 (Fed. Cir. 1988); *In re Beasley*, No. 04-1225, 117 Fed. Appx. 739, 743 - 745 (Fed. Cir. 2004).

3. The claims are believed allowable as amended because the references may not be combined in the manner attempted for the reason that the fact that a prior art structure could be modified to produce the claimed invention does not make the modification obvious unless the prior art suggests the desirability of, or motivation for, the modification. *In re Fritch*, 23 U.S.P.Q. 2d 1780, 1783 (Fed. Cir. 1992). There are no teachings, motivations, suggestions, or incentives in the prior art references of Gaudio (US 6,799,965) and Jensen (US 6,709,266) to modify or to combine the prior art in the manner suggested by the Examiner. In fact, the Gaudio reference relies upon magnetic attraction less powerful than that delivered by the present invention since it's stated objective is to act to repel equal polarity to tip the burning candle

flame into a pool of wax. [U.S. Patent No. 6,799,965; column 7, lines 5 - 9]. The Jensen reference seeks to provide candle rotation by direct motor drive and a spindle attached thereto [U.S. Patent No. 6,709,266; column 6, lines 40 - 51]. None of the references cited by the Examiner teach or otherwise suggest applying any of their respective disclosed or claimed features to floating candles.

Claims 5 - 8:

Claims 5 - 8 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Gaudioso (US 6,799,965) in view of Jensen (US 6,709,266) and in view of Nevin, et al. (US 4,240,783).

In response to the Examiner's rejection of claims 5 - 8 under 35 U.S.C. 103(a) as being unpatentable over Gaudioso (US 6,799,965) in view of Jensen (US 6,709,266) and in view of Nevin, et al. (US 4,240,783), Applicant respectfully points out that the prior art patents cited by the Examiner, when applied to the claim language of the present amended application in each of the claims rejected under 35 U.S.C. 103(a), do not suggest, or show motivation for, the combination or modification of the present invention. More specifically:

1. The Gaudioso (US 6,799,965) patent reference teaches away from the present invention in that it is directed towards assemblies for extinguishing a lighted candle flame [see U.S. Patent No. 6,799,965; column 1, lines 5 - 10, 35 - 38, column

2, lines 4 - 21, Claims 1 through 26], whereas the present invention teaches the direct opposite, i.e., maintaining a pleasing lighted candle. *Lewmar Marine, Inc. v. Barient, Inc.*, 3 U.S.P.Q. 2d 1766, 1768 (Fed. Cir. 1987). In the present invention the "first magnetic member 11 and thus floating candle 10 are caused to rotate by magnetic attraction to produce a pleasing rotating flame." [specification, page 4, lines 3 - 4; Fig. 1]. The present invention also teaches an inexpensive device which can be easily adapted to a variety of candle sizes [specification, page 3, lines 6 - 7; Fig. 2], without regard to orientation of magnetic polarity. Thus, the Gaudioso reference teaches away from the present invention in that it is directed to apparatus which function by adhering to specific polarity alignment [see U.S. Patent No. 6,799,965; column 4, lines 35 - 44], which properly functions when reverse polarity of magnetic members repel each other to extinguish or otherwise douse a lighted candle [see U.S. Patent No. 6,799,965; column 4, line 63 through column 5, line 9], and wherein the physical distance between magnetic members varies as the apparatus functions [see U.S. Patent No. 6,799,965; column 7, lines 5 - 9]. Further, Gaudioso teaches limited rotatable motion in perpendicular planar orientation between magnetic members [see U.S. Patent No. 6,799,965; column 5, lines 10 - 21; column 6, lines 54 - 59; Figs. 4 and 10]. The

present invention teaches full rotatable motion in parallel planar orientation between magnetic members [see, e.g., specification, page 3, line 22 through page 4, line 4; Fig. 2].

2. The claims are believed allowable as amended because the references may not be combined in the manner attempted for the reason that it is not permissible to use the claims as a framework from which to pick and choose among individual references to recreate the claimed invention. *In re Fine*, 5 U.S.P.Q. 2d 1596, 1599 (Fed. Cir. 1988); *In re Beasley*, No. 04-1225, 117 Fed. Appx. 739, 743 - 745 (Fed. Cir. 2004).

3. The claims are believed allowable as amended because the references may not be combined in the manner attempted for the reason that the fact that a prior art structure could be modified to produce the claimed invention does not make the modification obvious unless the prior art suggests the desirability of, or motivation for, the modification. *In re Fritch*, 23 U.S.P.Q. 2d 1780, 1783 (Fed. Cir. 1992). There are no teachings, motivations, suggestions, or incentives in the prior art references of Gaudioso (US 6,799,965) and Jensen (US 6,709,266) to modify or to combine the prior art in the manner suggested by the Examiner. In fact, the Gaudioso reference relies upon magnetic attraction less powerful than that delivered by the present invention since it's stated objective is to act to repel equal polarity to tip the burning candle

flame into a pool of wax. [U.S. Patent No. 6,799,965; column 7, lines 5 - 9]. The Jensen reference seeks to provide candle rotation by direct motor drive and a spindle attached thereto [U.S. Patent No. 6,709,266; column 6, lines 40 - 51]. None of the references cited by the Examiner teach or otherwise suggest applying any of their respective disclosed or claimed features to floating candles.

Claim 9:

Claim 9 stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Gaudioso (US 6,799,965) in view of Jensen (US 6,709,266).

In response to the Examiner's rejection of claim 9 under 35 U.S.C. 103(a) as being unpatentable over Gaudioso (US 6,799,965) in view of Jensen (US 6,709,266), Applicant respectfully points out that the prior art patents cited by the Examiner, when applied to the claim language of the present amended application in each of the claims rejected under 35 U.S.C. 103(a), do not suggest, or show motivation for, the combination or modification of the present invention. More specifically:

1. The Gaudioso (US 6,799,965) patent reference teaches away from the present invention in that it is directed towards assemblies for extinguishing a lighted candle flame [see U.S. Patent No. 6,799,965; column 1, lines 5 - 10, 35 - 38, column 2, lines 4 - 21, Claims 1 through 26], whereas the present

invention teaches the direct opposite, i.e., maintaining a pleasing lighted candle. *Lewmar Marine, Inc. v. Barient, Inc.*, 3 U.S.P.Q. 2d 1766, 1768 (Fed. Cir. 1987). In the present invention the "first magnetic member 11 and thus floating candle 10 are caused to rotate by magnetic attraction to produce a pleasing rotating flame." [specification, page 4, lines 3 - 4; Fig. 1]. The present invention also teaches an inexpensive device which can be easily adapted to a variety of candle sizes [specification, page 3, lines 6 - 7; Fig. 2], without regard to orientation of magnetic polarity. Thus, the Gaudioso reference teaches away from the present invention in that it is directed to apparatus which function by adhering to specific polarity alignment [see U.S. Patent No. 6,799,965; column 4, lines 35 - 44], which properly functions when reverse polarity of magnetic members repel each other to extinguish or otherwise douse a lighted candle [see U.S. Patent No. 6,799,965; column 4, line 63 through column 5, line 9], and wherein the physical distance between magnetic members varies as the apparatus functions [see U.S. Patent No. 6,799,965; column 7, lines 5 - 9]. Further, Gaudioso teaches limited rotatable motion in perpendicular planar orientation between magnetic members [see U.S. Patent No. 6,799,965; column 5, lines 10 - 21; column 6, lines 54 - 59; Figs. 4 and 10]. The present invention teaches full rotatable motion in parallel

planar orientation between magnetic members [see, e.g., specification, page 3, line 22 through page 4, line 4; Fig. 2].

2. The claims are believed allowable as amended because the references may not be combined in the manner attempted for the reason that it is not permissible to use the claims as a framework from which to pick and choose among individual references to recreate the claimed invention. *In re Fine*, 5 U.S.P.Q. 2d 1596, 1599 (Fed. Cir. 1988); *In re Beasley*, No. 04-1225, 117 Fed. Appx. 739, 743 - 745 (Fed. Cir. 2004).

3. The claims are believed allowable as amended because the references may not be combined in the manner attempted for the reason that the fact that a prior art structure could be modified to produce the claimed invention does not make the modification obvious unless the prior art suggests the desirability of, or motivation for, the modification. *In re Fritch*, 23 U.S.P.Q. 2d 1780, 1783 (Fed. Cir. 1992). There are no teachings, motivations, suggestions, or incentives in the prior art references of Gaudioso (US 6,799,965) and Jensen (US 6,709,266) to modify or to combine the prior art in the manner suggested by the Examiner. In fact, the Gaudiso reference relies upon magnetic attraction less powerful than that delivered by the present invention since it's stated objective is to act to repel equal polarity to tip the burning candle flame into a pool of wax. [U.S. Patent No. 6,799,965; column 7,

lines 5 - 9]. The Jensen reference seeks to provide candle rotation by direct motor drive and a spindle attached thereto [U.S. Patent No. 6,709,266; column 6, lines 40 - 51]. None of the references cited by the Examiner teach or otherwise suggest applying any of their respective disclosed or claimed features to floating candles.

CLAIM AMENDMENTS

Claims 1 - 9 as amended above overcome the objections set forth in the office action and are now presented in a straightforward manner consistent with the specification.

CONCLUSION

With the filing of this response, the application and all claims should be in condition for allowance. Notification of the allowance of this application is respectfully solicited.

For all the reasons advanced above, Applicant respectfully submits that the application is in condition for allowance and that action is earnestly solicited.

Dated: February 21, 2006.

Respectfully submitted,
/Charles L. Thoeming
Charles L. Thoeming
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Registration No. 43,951

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Enclosures: Appendix A - [6 pages]
Appendix B - [6 pages]

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/Charles L. Thoeming/
Charles L. Thoeming, Registered
Attorney for Applicant
Customer No. 27015
Registration No. 43,951

Dated: February 21, 2006.

cc: Ephrian Jordan (w/encl.)

CHARLES L. THOEMING
ATTORNEY & COUNSELOR AT LAW
REGISTERED PATENT ATTORNEY

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Filed under cover of this coversheet for Application Serial No. 10/805,837 are: 1) Facsimile Coversheet; 2) Transmittal; and 3) Revocation of Power of Attorney with New Power of Attorney and Change of Correspondence Address for a total of three (3) pages.

Respectfully submitted
/Charles L. Thoeming/
Charles L. Thoeming
Registration No. 43,951

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APPENDIX "A"

PTO/SB/21 (09-04)

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TRANSMITTAL FORM <i>(to be used for all correspondence after initial filing)</i>	Application Number	10/ 805,837	RECEIVED CENTRAL FAX CENTER FEB 21 2006
	Filing Date	03/22/2004	
	First Named Inventor	EPHRIAN JORDAN	
	Art Unit	2875	
	Examiner Name	JOHN A. WARD	
Total Number of Pages in This Submission	3	Attorney Docket Number	11908

ENCLOSURES (Check all that apply)		
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Firm Name	CHARLES L. THOEMING / Bielen, Lampe & Thoeming, P.A.		
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Printed name	Charles L. Thoeming		
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This collection of information is required by 37 CFR 1.5. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11 and 1.14. This collection is estimated to 2 hours to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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APPENDIX "A"

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REVOCATION OF POWER OF ATTORNEY WITH NEW POWER OF ATTORNEY AND CHANGE OF CORRESPONDENCE ADDRESS	Application Number	10/805,837
	Filing Date	03/22/2004
	First Named Inventor	EPHRIAN JORDAN
	Art Unit	2875
	Examiner Name	JOHN A. WARD
	Attorney Docket Number	11906

I hereby revoke all previous powers of attorney given in the above-identified application.

☐ A Power of Attorney is submitted herewith.

OR

☒ I hereby appoint the practitioners associated with the Customer Number:

27015

☒ Please change the correspondence address for the above-identified application to:☒ The address associated with
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I am the:

☒ Applicant/Inventor.☐ Assignee of record of the entire interest. See 37 CFR 3.71.
Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)**SIGNATURE of Applicant or Assignee of Record**

Signature	/EPHRIAN JORDAN/		
Name	EPHRIAN JORDAN		
Date	01/31/2006	Telephone	707-481-4565

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below.

☒ *Total of ONE (1) forms are submitted.

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Respectfully submitted /Charles L. Thoeming/ Charles L. Thoeming Registration No. 43,951							
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APPENDIX "A"

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APPENDIX "A"

CHARLES L. THOEMING
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REGISTERED PATENT ATTORNEY

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Filed under cover of this coversheet for Application Serial No. 10/805,837 are: 1) Facsimile Coversheet; 2) Transmittal; and 3) Revocation of Power of Attorney with New Power of Attorney and Change of Correspondence Address for a total of three (3) pages. These materials were previously filed on 02/02/2006; however, to date no change has occurred in the Private PAIR access.

Respectfully submitted
/Charles L. Thoeming/
Charles L. Thoeming
Registration No. 43,951

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APPENDIX "B"

PTO/SB/21 (09-04)

Approved for use through 07/31/2006. OMB 0551-0031

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TRANSMITTAL FORM <i>(to be used for all correspondence after initial filing)</i>	Application Number	10/ 805,837	RECEIVED CENTRAL FAX CENTER FEB 21 2006
	Filing Date	03/22/2004	
	First Named Inventor	EPHRIAN JORDAN	
	Art Unit	2875	
	Examiner Name	JOHN A. WARD	
Total Number of Pages in This Submission	3	Attorney Docket Number	11906

ENCLOSURES (Check all that apply)		
<input type="checkbox"/> Fee Transmittal Form <input type="checkbox"/> Fee Attached <input type="checkbox"/> Amendment/Reply <input type="checkbox"/> After Final <input type="checkbox"/> Affidavits/declaration(s) <input type="checkbox"/> Extension of Time Request <input type="checkbox"/> Express Abandonment Request <input type="checkbox"/> Information Disclosure Statement <input type="checkbox"/> Certified Copy of Priority Document(s) <input type="checkbox"/> Reply to Missing Parts/ Incomplete Application <input type="checkbox"/> Reply to Missing Parts under 37 CFR 1.52 or 1.53	<input type="checkbox"/> Drawing(s) <input type="checkbox"/> Licensing-related Papers <input type="checkbox"/> Petition <input type="checkbox"/> Petition to Convert to a Provisional Application <input checked="" type="checkbox"/> Power of Attorney, Revocation <input type="checkbox"/> Change of Correspondence Address <input type="checkbox"/> Terminal Disclaimer <input type="checkbox"/> Request for Refund <input type="checkbox"/> CD, Number of CD(s) _____ <input type="checkbox"/> Landscape Table on CD	<input type="checkbox"/> After Allowance Communication to TC <input type="checkbox"/> Appeal Communication to Board of Appeals and Interferences <input type="checkbox"/> Appeal Communication to TC (Appeal Notice, Brief, Reply Brief) <input type="checkbox"/> Proprietary information <input type="checkbox"/> Status Letter <input checked="" type="checkbox"/> Other Enclosure(s) (please identify below): 1) FACSIMILE COVERSHEET
Remarks _____		

SIGNATURE OF APPLICANT, ATTORNEY, OR AGENT

Firm Name	CHARLES L. THOEMING / Bielen, Lampe & Thoeming, P.A.		
Signature	/CHARLES L. THOEMING/		
Printed name	Charles L. Thoeming		
Date	13FEBRUARY 2006	Reg. No.	43,951

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Signature	/CHARLES L. THOEMING/		
Typed or printed name	Charles L. Thoeming	Date	13 FEBRUARY 2006

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PTO/SB/82 (04-05)

Approved for use through 11/30/2005. OMB 0651-0035

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**REVOCATION OF POWER OF
ATTORNEY WITH
NEW POWER OF ATTORNEY
AND
CHANGE OF CORRESPONDENCE ADDRESS**

Application Number	10/805,837
Filing Date	03/22/2004
First Named Inventor	EPHRIAN JORDAN
Art Unit	2875
Examiner Name	JOHN A. WARD
Attorney Docket Number	11906

I hereby revoke all previous powers of attorney given in the above-identified application.

☐ A Power of Attorney is submitted herewith.

OR

☒ I hereby appoint the practitioners associated with the Customer Number: 27015

☒ Please change the correspondence address for the above-identified application to:

☒ The address associated with
Customer Number:

27015

OR

☐ Firm or
Individual Name

Address

City

State

Zip

Country

Telephone

Email

I am the:

☒ Applicant/Inventor.

☐ Assignee of record of the entire interest. See 37 CFR 3.71.
Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)

SIGNATURE of Applicant or Assignee of Record

Signature

Name

EPHRIAN JORDAN

Date

1/31/06

Telephone

707-481-4565

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below.

☒ *Total of ONE (1) forms are submitted.

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APPENDIX "B"

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925-2889731
Feb 13 2006 9:26am

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<u>Date</u>	<u>Time</u>	<u>Type</u>	<u>Identification</u>	<u>Duration</u>	<u>Pages</u>	<u>Result</u>
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APPENDIX "B"

Auto-Reply Facsimile Transmission



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Page

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Feb 13 06 08:25a BIELEN LAMPE & THOEMING 925-2889731 p.1	
<div style="border: 1px solid black; padding: 5px;"><p>CHARLES L. THOEMING ATTORNEY & COUNSELOR AT LAW REGISTERED PATENT ATTORNEY</p><p>BIELEN, LAMPE & THOEMING, P.A. TWO CORPORATE CENTRE 1390 WILLOW PASS ROAD SUITE 1020 CONCORD, CA 94520</p><p>(925) 288-9730 (925) 288-9731 FAX hadvoban@earthlink.net EMAIL</p><p>ADMITTED TO PRACTICE IN CALIFORNIA AND TEXAS</p></div>	
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DATE: February 12, 2006	
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COMMENTS: Filed under cover of this coversheet for Application Serial No. 10/805,837 are: 1) Facsimile Coversheet; 2) Transmittal; and 3) Revocation of Power of Attorney with New Power of Attorney and Change of Correspondence Address for a total of three (3) pages. <u>These materials were previously filed on 02/03/2006, however, to date no change has occurred in the Private PATR access.</u>	
<div style="border: 1px solid black; padding: 5px; text-align: right;"><p>Respectfully submitted /Charles L. Thoeming Charles L. Thoeming Registration No. 43,951</p></div>	
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APPENDIX "B"

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925-2889731
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Feb 13	9:27am	Received	USPTO	0:52	1	OK

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